Standard Chartered Bank Malaysia Bhd v Duli Yang Maha Mulia Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang Di Pertuan Besar Negeri Sembilan Darul Khusus

SPECIAL COURT (PUTRAJAYA) — CIVIL SUIT NOS 5–2005 AND 6–2005

ABDUL HAMID MOHAMAD CHIEF JUSTICE, ALAUDDIN CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), ARIFIN ZAKARIA AND ZULKEFLI FCJJ

15 OCTOBER 2008

Banking — Banks and banking business — Standby letter of credit (SBLC) with letter of set-off of fixed deposit as security — Call upon SBLC by beneficiary — Whether SBLC was revocable and had been validly revoked or rescinded by defendant prior to call — Whether plaintiff bank was estopped from recognising rescission of SBLC or from exercising any rights under letter of set-off — Whether request for payment by beneficiary was made with intention of defrauding plaintiff as paying bank

This judgment concerned two related suits. In the first suit the plaintiff instituted a suit against the defendant, claiming the sum of US$999,772.44 and commission, which claim arose from a standby letter of credit ('SBLC') issued by the plaintiff bank. On 11 February 1999, the defendant had requested the plaintiff to issue a SBLC for US$1m in favour of the Connecticut Bank of Commerce ('CBC'), the beneficiary. In the documentary credit application ('the application form'), which was completed and signed by the defendant, he had requested the plaintiff bank to issue an irrevocable SBLC to CBC for the purpose of retiring off the loan given by CBC to Texas Encore LLC ('TEC'). The reverse page of this application form stated that the application would be subject to the Uniform Customs and Practice for Documentary Credits 1993 ('UCP 500'). As security the defendant was also required to execute a letter of set-off over a fixed deposit he had deposited with the plaintiff bank. The plaintiff then issued an irrevocable SLBC for US$1m in favour of CBC; the SBLC, which was effective as from 11 February 1999 and expired on 31 January 2001, was subject to the UCP 500. On 6 April 1999, the defendant wrote to the plaintiff bank requesting that the irrevocable SBLC be suspended. The manager of the plaintiff bank informed the defendant that an irrevocable SBLC could not be suspended or revoked once issued but at the continued request of the defendant and owing to the status and position of the defendant he agreed to write to the Standard Chartered Bank New York

('SCBNY') to request them to give notice to the beneficiary that the defendant wished to suspend the irrevocable SBLC. Thus on 14 April 1999, the plaintiff bank wrote to SCBNY to relay a message to the beneficiary that, since the irrevocable SBLC though approved had not been disbursed, the defendant applicant would like to give notice of his intention to suspend the said SBLC. On 16 April 1999 another message was sent replacing the earlier one giving notice of the defendant's intention to rescind the SBLC. There was no further communication on the said notice of rescission dated 16 April 1999 by any of the parties. On 15 December 1999 SCBNY informed the plaintiff bank that it had been given notice of drawing on the SBLC. The plaintiff relayed this message to the defendant who applied for and obtained an ex parte injunction on 18 December 1999, inter alia, restraining CBC from calling or drawing upon the SBLC and also restraining the plaintiff bank from proceeding to exercise any rights under the letter of set-off over the fixed deposit that the defendant had with the plaintiff bank. However, the amount under the SBLC having been paid to CBC, the plaintiff claimed against the defendant for the sum paid or alternatively for a declaration that the plaintiff bank was entitled to set-off the said sum against the fixed deposit of the defendant pursuant to the letter of set-off. The plaintiff contended that since the SBLC was irrevocable and in force at the time, SCBNY as the confirming bank was under an obligation to make payment to CBC as the beneficiary when the latter made a call on the bank. As such, the plaintiff submitted that as the issuing bank it was liable to reimburse SCBNY and was accordingly entitled to seek reimbursement from the applicant. The defendant on the other hand contended that the SBLC was not irrevocable and that the UCP 500 was not brought to his attention. As such he contended that the SBLC had been validly revoked prior to its release to CBC and that the payment to CBC was in defiance of an injunction order. The defendant further alleged fraud and estoppel against the plaintiff bank. The second suit was a countersuit by the defendant against the plaintiff bank. In that suit the Yang Di Pertuan Besar of Negeri Sembilan, as the plaintiff, prayed for a declaration that the Standard Chartered Bank of Malaysia was not entitled in law to apply or appropriate the fixed deposit sum in settlement of any liability arising from the SBLC, damages and costs. The main issues to be considered in both suits were whether the SBLC was revocable and whether it had been validly revoked or rescinded by the defendant; whether the plaintiff bank was estopped from recognising the rescission of the SBLC or from exercising any rights under the letter of set-off; and whether the request for payment by CBC was made with the intention of defrauding the plaintiff as the paying bank.

Held, allowing the plaintiff's claim in the first suit with interest and costs, with liberty to set-off the judgment sum against the fixed deposit; and

dismissing the defendant's claim in the second suit (the countersuit) with costs:

(1) From the application form, completed by the defendant, and the SBLC that was issued it was clear that the SBLC issued by the plaintiff bank to the defendant was an irrevocable SBLC. This meant that as from the effective date, ie from 11 February 1999, to the expiry date, which was 31 January 2001, the SLBC was available for payment when the stipulated documents were presented to the confirming bank, unless it was validly revoked. Under the UCP 500 an irrevocable SBLC is a definite undertaking that cannot be revoked or rescinded unilaterally by the defendant without the consent of the beneficiary. In the present case, when there was no response from the beneficiary, CBC, after receipt of the defendant's intention to rescind the SBLC the most likely inference to be made was that the SBLC was not legally revoked or rescinded. The silence by CBC could not be held to amount to consent. Neither should the plaintiff as the issuing bank be held liable simply because it assisted the defendant to convey his intention or decision to rescind the irrevocable SBLC to the beneficiary, CBC (see paras 26, 29 & 32).

(2) The fact that the plaintiff bank obliged to assist to convey the defendant's notice of rescission to SCBNY could not be used to hold that the plaintiff was estopped from accepting any call on the SBLC. There was no 'promise' on the part of the plaintiff bank for the defendant to found estoppel (see paras 55–56).

(3) The first part of the injunction order was directed at CBC, in that it was to restrain CBC from calling upon the SLBC. Since CBC was not a party in these suits that part of the injunction order need not be considered in this judgment. The second part of the injunction order was to restrain the plaintiff from proceeding to exercise any rights under the letter of set-off over the fixed deposit that the defendant had with the plaintiff bank. That had been complied with by the plaintiff and was what these two suits were about (see paras 62–64).

(4) The defendant's argument that the certification of indebtedness relied upon were false documents intended to defraud the plaintiff as the paying bank run counter to the defendant's pleaded case. It is trite law that the parties are bound by their pleadings (see paras 82–84).

[Bahasa Malaysia summary

Penghakiman ini berkenaan dua guaman berkaitan. Dalam guaman pertama plaintif memulakan guaman terhadap defendan, menuntut sejumlah US$999,772.44 dan komisen, yang mana tuntutan berbangkit daripada surat

kredit tunggu sedia ('SKTS') yang dikeluarkan oleh plaintif bank. Pada 11 Februari 1999, defendan telah memohon kepada plaintif untuk mengeluarkan SKTS sejumlah US$1 juta atas nama Connecticut Bank of Commerce ('CBC'), benefisiari. Dalam permohonan kredit dokumentari ('borang permohonan'), yang telah dilengkapkan dan ditandatangani olehnya defendan, memohon plaintif bank mengeluarkan SKTS tak boleh batal kepada CBC bagi tujuan menyelesaikan pinjaman yang diberikan oleh CB kepada Texas Encore LLC ('TEC'). Di bahagian belakang halaman borang permohonan ini dinyatakan bahawa permohonan adalah tertakluk kepada Uniform Customs and Practice for Documentary Credits 1993 ('UCP 500'). Sebagai jaminan defendan juga dikehendaki menyempurnakan surat tolakan ke atas deposit tetap yang disimpannya dengan plaintif bank. Plaintif kemudian telah mengeluarkan SKTS tak boleh batal untuk US$1 juta atas nama CBC; SKTS, yang mula berkuat kuasa dari 11 Februari 1000 dan tamat pada 31 Januari 2001, tertakluk kepada UCP 500. Pada 6 April 1999, defendan telah menulis kepada plaintif bank memohon agar SKTS tak boleh batal itu digantung. Pengurus plaintif bank telah memberitahu defendan bahawa SKTS tak boleh batal tidak boleh digantung atau dibatalkan setelah dikeluarkan tetapi atas permintaan berterusan defendan dan berdasarkan status dan kedudukannya defendan bersetuju untuk menulis kepada Standard Chartered Bank New York ('SCBNY') untuk meminta mereka memberikan notis kepada benefisiari bahawa defendan berniat untuk menggantungkan SKTS tak boleh batal itu. Oleh itu pada 14 April 1999, plaintif bank telah menulis kepada SCBNY untuk menyampaikan pesanan kepada benefisiari bahawa, memandangkan SKTS tak boleh batal meskipun telah diluluskan masih belum dibayar, defendan pemohon ingin memberikan notis tentang niatnya untuk menggantung SKTS tersebut. Pada 16 April 1999 satu lagi pesanan telah dihantar menggantikan yang terdahulu memberikan notis tentang niat defendan untuk membatalkan SKTS itu. Tiada komunikasi selanjutnya tentang notis pembatalan bertarikh 16 April 1999 tersebut daripada mana-mana pihak. Pada 15 Disember 1999 SCBNY telah memberitahu plaintif bank bahawa ia telah memberikan notis menarik balik SKTS itu. Plaintif telah menyampaikan pesanan ini kepada defendan yang telah memohon untuk dan memperoleh injunksi ex parte pada 18 Disember 1999, antara lain, menghalang plaintif bank daripada terus melaksanakan apa-apa hak di bawah surat tolakan ke atas deposit tetap yang defendan ada dengan plaintif bank. Walau bagaimanapun, jumlah di bawah SKTS yang telah dibayar kepada CBC, plaintif telah menuntut terhadap defendan untuk jumlah yang telah dibayar itu atau secara alternatif untuk deklarasi bahawa plaintif bank berhak menolak jumlah tersebut daripada deposit tetap defendan menurut surat tolakan. Plaintif menegaskan bahawa memandangkan SKTS itu tak boleh batal dan berkuat kuasa pada masa itu, SCBNY sebagai bank pengesah berada di bawah tanggungjawab untuk membuat bayaran kepada CBC sebagai benefisiari apabila CBC membuat permintaan bayaran oleh bank itu. Oleh itu, plaintif menghujahkan bahawa

A sebagai bank pengeluar ia bertanggungjawab untuk membayar balik SCBNY dan sewajarnya berhak meminta bayaran balik daripada pemohon. Defendan sebaliknya menegaskan bahawa SKTS bukannya tak boleh batal dan bahawa UCP 500 tidak dibawa ke perhatiannya. Oleh itu defendan menegaskan bahawa SKTS telah pun sah dibatalkan sebelum ia dilepaskan kepada CBC
B dan bahawa bayaran kepada CBC mengingkari perintah injunksi. Defendan selanjutnya membuat dakwaan fraud dan estopel terhadap plaintif bank. Guaman kedua merupakan guaman balas oleh defendan terhadap plaintif bank. Dalam guaman tersebut Yang Di Pertuan Besar Negeri Sembilan, sebagai plaintif, memohon deklarasi bahawa Standard Chartered Bank
C Malaysia tidak berhak dari segi undang-undang untuk memohon atau menggunakan jumlah deposit tetap sebagai penyelesaian apa-apa liabiliti yang timbul daripada SKTS, ganti rugi dan kos. Isu utama yang perlu ditentukan dalam kedua-dua guaman adalah sama ada SKTS itu tak boleh batal dan sama ada ia telah pun dibatalkan atau ditamatkan secara sah oleh defendan;
D sama ada plaintif bank diestop daripada mengiktiraf pembatalan SKTS itu atau daripada melaksanakan apa-apa hak di bawah surat tolakan itu; dan sama ada permintaan untuk bayaran oleh CBC dibuat dengan niat menipu plaintif sebagai bank pembayar.

E

Diputuskan, membenarkan tuntutan plaintif dalam guaman pertama dengan faedah dan kos, dengan kebebasan untuk menolak jumlah penghakiman terhadap deposit tetap; dan menolak tuntutan defendan dalam
F guaman kedua (guaman balas) dengan kos:

(1) Dari borang permohonan, yang telah dilengkapkan oleh defendan, dan SKTS yang telah dikeluarkan ia adalah jelas bahawa SKTS yang dikeluarkan oleh plaintif bank kepada defendan merupakan SKTS yang tak boleh batal. Ini bermakna mulai tarikh berkuat kuasa, iaitu dari 11
G Februari 1999, sehingga tarikh luput, iaitu 3 Januari 2001, SKTS itu sedia ada untuk bayaran apabila dokumen-dokumen yang ditetapkan dikemukakan kepada bank pengesah, kecuali jika ia telah dibatalkan secara sah. Di bawah UCP 500 SKTS yang tak boleh batal merupakan aku janji yang telah ditetapkan yang tidak boleh dibatalkan atau
H ditamatkan di satu pihak oleh defendan tanpa persetujuan benefisiari. Dalam kes ini apabila tiada maklum balas daripada benefisiari, CBC, setelah menerima niat defendan untuk membatalkan SKTS itu kemungkinan besar andaian yang dibuat adalah bahawa SKTS itu tidak ditamatkan atau dibatalkan secara sah. Sikap diam diri CBC tidak
I boleh diputuskan sebagai membentuk persetujuan. Plaintif sebagai bank pengeluar juga tidak patut dipertanggungjawabkan kerana ia membantu defendan menyampaikan niat atau keputusannya membatalkan SKTS yang tak boleh batal itu kepada benefisiari, CBC (lihat perenggan 26, 29, & 32).

(2) Hakikat bahawa plaintif bank bertanggungjawab membantu untuk menyampaikan notis pembatalan defendan kepada SCBNY tidak boleh digunakan untuk memutuskan bahawa plaintif diestop daripada menerima apa-apa panggilan tentang SKTS itu. Tiada 'promise' di pihak plaintif bank untuk defendan memperoleh estopel (lihat perenggan 55–56).

(3) Bahagian pertama perintah injunksi diarahkan kepada CBC, yang mana ia hendaklah menghalang CBC daripada meminta pembayaran untuk SKTS itu. Memandangkan CBC bukan pihak dalam guaman-guaman tersebut maka bahagian perintah injunksi tersebut tidak boleh dianggap sebahagian daripada penghakiman ini. Bahagian kedua perintah injunksi adalah untuk menghalang plaintif daripada terus melaksanakan apa-apa hak di bawah surat tolakan ke atas deposit tetap yang defendan ada dengan plaintif bank. Ia telah dipatuhi oleh plaintif dan kedua-dua guaman tersebut adalah berkenaannya (lihat perenggan 62–64).

(4) Hujahan defendan bahawa sijil keberhutangan yang digunakan adalah dokumen-dokumen palsu yang bertujuan untuk menipu plaintif sebagai bank pembayar bertentangan dengan kes yang diplidkan oleh defendan. Adalah undang-undang tetap bahawa pihak-pihak adalah terikat dengan pliding mereka (lihat perenggan 82–84).]

Notes

For cases on banks and banking business in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1877–2022.

Cases referred to

Bank Russo-Iran v Gordon, Woodroffe & Co Ltd Unreported, 3 October 1972 (refd)

Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor [1978] 1 All ER 976, CA (refd)

LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor [2000] 3 MLJ 339, CA (refd)

RD Harbottle (Mercantile) Ltd v National Westminster Bank & Ors [1978] QB 146, (refd)

Southern Ocean Shipbuilding Co Pte Ltd v Deutsche Bank AG [1993] 3 SLR 686, HC (refd)

Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd [1991] 2 MLJ 565, HC (refd)

Sztejn v J Henry Schroder Banking Corporation (1941) 31 NYS 2d 631, CA (refd)

United Trading v Allied Arab Bank [1985] 2 LLR 554, CA (refd)

Legislation referred to
Uniform Customs and Practice for Documentary Credits 1993

Appeal from: Civil Suit No 6 of 2005 (Special Court, Putrajaya)

Robert Lazar, Rabindra S Nathan & Nad Segaram (Shearn Delamore & Co) for the plaintiff.
Cyrus Das, Mohan Kanagasabai, Kevin Prakash & Shamsul Bahrin Manaf (Shook Lin & Bok) for the defendant.

Abdul Hamid Mohamad CJ (delivering judgment of the court):

[1] There are two related suits. In the first suit, No 5 of 2005, the plaintiff is the Standard Chartered Bank of Malaysia ('SCBMB') and the defendant is, in brief, the Yang Di Pertuan Besar of Negeri Sembilan ('DYMM'). The claim is for the sum of US999,772.44 and commission at the rate of 0.125% per month or alternatively for a declaration that SCBMB is entitled to set-off the said sum and commission fee against the fixed deposit of DYMM with SCBMB pursuant to the letter of set-off. The claim arises from a standby letter of credit ('SBLC') issued by SCBMB at the request of DYMM to the benefit of Connecticut Bank of Commerce ('CBC'), the beneficiary of the SBLC. The amount has been paid to CBC. Hence, SCBMB claims against DYMM.

[2] DYMM counter-sued SCBMB. He prayed for a declaration that SCBMB was not entitled in law to uplift or apply or appropriate the fixed deposit sum in settlement of any liability arising from the said SBLC, damages and costs. That is suit No 6 of 2005.

[3] We shall now give a very brief chronology of events.

[4] By a letter dated 5 February 1999 addressed to the Seremban Branch of SCBMB, DYMM applied for the establishment of a SBLC in favour of CBC, the beneficiary.

[5] On 12 February 1999 SCBMB established SBLC No 312010325732-A ('the SBLC') in favour of CBC. The SBLC was for USD1,000,000.

[6] By a letter dated 15 February 1999 SCBMB required DYMM to execute a security for the SBLC in the form of a letter of set-off over a fixed deposit in the sum of RM4,180,000 deposited by DYMM with the Seremban branch of SCBMB. The letter of set-off was executed by DYMM.

[7] By a letter dated 6 April 1999, DYMM wrote to SCBMB asking for the SBLC to be suspended. **A**

[8] By telex dated 16 April 1999 to the confirming bank, Standard Chartered Bank New York ('SCBNY'), the SCBMB on behalf of DYMM gave notice of rescission of the SBLC. **B**

[9] So much of these facts are agreed by the parties.

[10] DYMM further asserts that as at 16 April 1999 the loan by CBC to Texas Encore LLC ('TEC') for which the SBLC was issued had not been released by CBC to TEC. **C**

[11] There was no communication on the notice of rescission dated 16 April 1999 either from SCBMB, SCBNY or CBC with DYMM until 15 December 1999. **D**

[12] Then, on 15 December 1999, by a telephone communication SCBMB was informed by SCBNY that SCBNY had been given notice of drawing on the SBLC for the purpose of retiring off the loan given by CBC to TEC. A copy of the said message dated 15 December 1999 was relayed by SCBMB to DYMM. In that message SCBNY indicated that they had confirmed the SBLC with CBC. **E**

[13] DYMM through his attorney (Dato' Hari Menon) immediately communicated with SCBMB and was told by SCBMB by an e-mail dated 16 December 1999 that the onus was on DYMM getting an injunction. DYMM applied for and obtained an ex parte injunction on 18 December 1999, restraining, inter alia, CBC from making a call on the SBLC and also restraining SCBMB from uplifting the fixed deposit of RM4.18m under the letter of set-off. **F** **G**

[14] SCBMB was notified of the order on 18 December 1999 by personal delivery at its branch in Seremban and Kuala Lumpur headquarters. **H**

[15] On 22 December 1999, and again on 24 December 1999 SCBNY as confirming bank, paid out monies under the SBLC to CBC. On 29 December 1999 DYMM obtained an injunction order on an inter parte basis, on the same terms as the ex parte order obtained earlier. **I**

[16] On 22 December 1999 SCBMB's account with SCBNY was debited for USD314,772.44 and on 21 December 1999 for USD685,000 equivalent to the sum paid by SCBNY to CBC.

[17] Those were assertions made by DYMM.

[18] The SCBMB's case may be summarised as follows:

(a) The SBLC was irrevocable and as such was still in force at the material time. It could only be revoked with the consent of the beneficiary and such consent was clearly not forthcoming.

(b) Upon presentation of documents that were regular on their face, SCBNY as confirming bank was under an obligation to make payment to the beneficiary.

(c) Consequent upon such payment, SCBMB as issuing bank was liable to reimburse SCBNY and accordingly was entitled to seek reimbursement from the applicant.

[19] The DYMM's case may be summarised under the following headings:

(a) Estoppel;

(b) The SBLC was not irrevocable and was validly revoked; prior to the release of the loan by CBC to TEC;

(c) Fraud;

(d) Payment in defiance of injunction order; and

(e) Quantum has not been proved.

IS THE SBLC IRREVOCABLE?

[20] We shall begin with the facts.

[21] On 11 February 1999 DYMM requested SCBMB to issue a 'documentary credit'. The title of the application form is 'documentary credit application.' In box 13 under the title 'goods', the following words were filled in:

> Collateral for USD1 Million Credit Facilities with Connecticut Bank of Commerce, 612 Bedford St., Stamford in favour of Texas Encore L.L.C.

[22] DYMM signed at box 31 beside the box containing the following words:

> We request you to issue your irrevocable documentary credit for our account in accordance with the above instructions (marked with an X where appropriate).

> The credit will be subjected to the current Uniform Customs and Practice for documentary credit, International Chamber of Commerce, in so far as they are applicable.
>
> We agree to be bound by the Continuing Commercial Credit Agreement executed/General Conditions appearing on the reverse thereof.

[23] On the reverse of the application form, it is stated:

> The terms and conditions herein set out shall be subject to the Uniform Customs and Practice for documentary credits International Chamber of Commerce, currently in force except so far as is expressly stated herein. The terms used herein shall have the same meanings as are set out in the UCP.

[24] SCBMB then issued the 'irrevocable standby letter of credit' as the document is called. It is addressed to CBC, from SCBMB and the applicant being DYMM. Further the SBLC contains the following words:

> EFFECTIVE DATE: 11TH FEBRUARY 1999
>
> EXPIRY DATE: 31ST JANUARY, 2001
>
> USD1,000,000 (UNITED STATES DOLLARS: ONE MILLION ONLY).
>
> AT THE REQUEST AND FOR THE ACCOUNT OF THE APPLICANT, WE HEREBY ESTABLISH THIS IRREVOCABLE STANDBY LETTER OF CREDIT IN YOUR FAVOUR FOR THE PURPOSE OF COVERING UNPAID INDEBTEDNESS DUE TO YOU ARISING OUT OF BANKING FACILITIES GRANTED BY YOU TO TEXAS EBNCORE L.L.C.

[25] It is to be noted that throughout the document, the term 'irrevocable standby letter of credit' is used. At p 3 it is again stated:

> THIS IRREVOCABLE STANDBY LETTER OF CREDIT IS ISSUED SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS 1993 REVISION, INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO 500.

[26] By merely looking at these documents alone there is not the slightest doubt that the standby letter of credit in question is an irrevocable one.

When is the effective date?

[27] This is again very clearly provided by the SBLC itself. The effective date is 11 February 1999 and the expiry date is 31 January 2001. What it means is that during that period, so long as the SBLC is not validly revoked

A and on the presentation of documents (A) and (B) stipulated in the SBLC, the SBLC is available for payment. In other words, the SBLC is an irrevocable SBLC from its effective date. That is its clear meaning.

Is the irrevocable SBLC revocable unilaterally?

B

[28] The documents referred to so far clearly and repeatedly states that the SBLC was issued subject to the UCP 500, at times in capital letters. The argument that the UCP was not brought to the attention of DYMM and that a copy should have been given to him but was not given, is simply untenable.
C We hold that the SBLC was issued subject to the UCP 'in so far as these are applicable' as stated in the 'documentary credit application' ie the application form.

[29] Article 6 of the UCP 500 provides:
D

(a) a Credit may be either

(i) revocable

E or

(ii) irrevocable.

(b) The Credit, therefore, should clearly indicate whether it is revocable or irrevocable.

F

(c) In the absence of such indication the Credit shall be deemed to be irrevocable.

[30] Pausing here, the SBLC in question is clearly an irrevocable SBLC.
G The document speaks for itself.

[31] Article 8 talks about 'revocation of a credit'. Para (a) provides:

H A revocable Credit may be amended or cancelled by the issuing Bank at any moment and without prior notice to the Beneficiary.

[32] Article 9 under the heading 'Liability of Issuing and Confirming Banks' provides:

I

(a) An Irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or the Issuing Bank and the terms and conditions of the Credit are complied with:

(i) if the Credit provides for sight payment — to pay at sight;

(ii) ...

(b) A confirmation of an irrevocable Credit by another bank (the 'Confirming Bank') upon the authorization or request of the issuing Bank, constitutes a definite undertaking of the Confirming Bank, in addition to that of the Issuing Bank, provided the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the Credit are complied with:

(i) if the Credit provides for sight payment — to pay at sight

(ii) ...

(d)

(i) Except as otherwise provided by Article 48, an irrevocable Credit can neither be amended nor cancelled without the agreement of the Issuing Bank, the Confirming Bank, if any, and the beneficiary.

...

[33] So, d(i) is very clear. An irrevocable SBLC cannot be revoked unilaterally by customer.

[34] The High Court of Singapore in *Southern Ocean Shipbuilding Co Pte Ltd v Deutsche Bank AG* [1993] 3 SLR 686 at p 696, in interpreting art 10(d) of the UCP said:

By Virtue of Article 10(d) of the UCP, any amendment made to an irrevocable L/C must obtain the consent of the beneficiary.

Has the SBLC been validly revoked or rescinded?

[35] We shall now look at the facts regarding the alleged revocation or rescission.

[36] On 6 April 1999, DYMM issued a letter to SCBMB Seremban Branch requesting the irrevocable SBLC be suspended. The letter which bears the 'Istana Negara' address and emblem, inter alia, reads:

I had requested a standby letter of credit to be issued in favour of Connecticut Bank of Commerce, U.S.A. for facilities extended to M/S Texas Encore L.L.C.

I understand that the Banking facilities though approved has not been disbursed till to date.

A Kindly therefore *suspend* with immediate effect the standby letter of credit issued to the said Connecticut Bank of Commerce, U.S.A.

[37] In this respect SCBMB called a witness, Mohd Taufik bin Syed Abu Bakar ('Taufik'), who was the Manager of the Seremban Branch of SCBMB. In his affidavit evidence, he said:

Before the issuance of the letter Dato' Menon indicated to me verbally that the DYMM wanted to rescind the Irrevocable SBLC. I informed him that an Irrevocable SBLC could not be suspended or revoked once it was issued. He had asked me verbally around 4 to 5 times and I had repeatedly stated the same answer.

[38] He went on to say:

Despite my position as set out in my answer to question 16 above (ie the preceding paragraph — added), given the status and position of the DYMM and the sensitivities of the matter, I agreed to request SCBMB Trade Services Division to write to SCBNY and to request them to give notice to the beneficiary that the DYMM wished to suspend the irrevocable SBLC.

[39] The request made by fax contained a copy of a draft telex message to be issued by them to SCBNY to be passed on to the beneficiary.

[40] The message was sent to Loo Boon Ping, trade finance division at the headquarters of SCB in Kuala Lumpur. It reads:

As per our telephone conversation this morning HRH's Financial Sec. is aware that the SBLC cannot be revoked. I have accordingly intimated to him that, if really need be, the Bank can only write a note to the beneficiary's Banker and adduce the applicant's intention to suspend the SBLC but still require to get the beneficiary's approval. Accordingly the former (ie Dato' Hari Menon — added) has agreed and a fax from Tuanku Jaafar is enclosed herewith.

Please send the following message to the Connecticut Bank of Commerce, U.S.A.

[41] The content of the message dated 14 April 1999 is as follows:

PLS RELAY THE FOLLOWING MESSAGE TO THE BENEFICIARY ...

WE WERE INSTRUCTED TO INFORM YOU THAT NOTWITHSTANDING HAVING ISSUED THE USD1 MILLION STANDBY L/C IN FAVOUR OF TEXAS ENCORE LLC FOR THE PURPOSE OF GETTING CREDIT FACILITIES, THE SAME TO DATE DESPITE BEING APPROVED BUT HAVE NOT BEEN DISBURSED. AS SUCH THE

APPLICANT HEREBY GIVE NOTICE OF INTENTION TO SUSPEND THE SAID STANDBY L/C UNLESS THE FACILITIES IS IMMEDIATELY DISBURSED. YOUR URGENT RESPONSE IS APPRECIATED.

[42] Two days later, ie on 16 April 1999 another message was sent replacing the message dated 14 April 1999. The only difference is that the subsequent message states:

… AS SUCH THE APPLICANT HEREBY GIVE NOTICE TO RESCIND THE AFORESAID STANDBY L/C.

[43] There was no response by the beneficiary or any development on the notice.

[44] We have held that an irrevocable SBLC could only be revoked or rescinded with the consent of the beneficiary. Here, there was no response whatsoever from the beneficiary. Was the SBLC effectively revoked or rescinded? Our answer is in the negative.

[45] It must be noted that the consent in issue is the consent of CBC, the beneficiary. The party sought to be held liable is SCBMB, the issuing bank. We do not think that silence by CBC can be held to amount to consent. Neither should the issuing bank SCBMB be held liable simply because it assisted DYMM to convey his intention or decision to rescind the irrevocable SBLC to the beneficiary, CBC, something it did out of respect for the status of DYMM while repeatedly stressing its position that consent of the beneficiary was necessary to rescind the irrevocable SBLC. SCBMB was not even obliged to convey the message. Therefore it is ironic to argue that it becomes liable just because it obliged DYMM. In the circumstances, we hold that the irrevocable SBLC was not legally revoked or rescinded.

[46] It was alleged that it was only eight months after 16 April 1999 that they were notified that the beneficiary intended to make a call on the irrevocable SBLC. Learned counsel for the SCBMB pointed out that the statement was incorrect. This is because, by an email dated 23 September 1999, from Patrick Moran the CEO of TEC, to Gwi Chin Fatt, one of the Malaysian investors, Patrick Moran said:

My bank must receive a letter reversing the notice months ago that the LC was being withdrawn if not there will be serious consequences.

[47] On the following day, ie 24 September 1999, Gwi Chin Fatt send an email to Dato' Hari Menon enclosing the said email of Patrick Moran.

[48] On 27 September 1999, Dato' Hari Menon himself sent an email to Patrick Moran in which he said regarding the SBLC:

> The question of the LC was raised (at a meeting of the Malaysian investors on 22 September 1999 — added) and it was decided the TEC (through you) would approach the Bankers namely Connecticut Bank of Commerce for a variation of the terms of the loan approvals, namely for the waiver on the LC requirement to be posted by the Malaysians...

[49] This clearly shows that as on 28 September 1999 in the words of Dato' Hari Menon himself, the SBLC was still in force.

[50] On 5 October 1999, Patrick Moran replied to Dato' Hari Menon's email. Among other things he said:

> Now as to the letter of credit. When I received your email, I requested that the bank to withdraw their requirement for the letter of credit. The bank explained that there is a problem with the request and had to say no
>
> ...
>
> Leave the letter of credit for now ...

[51] On 17 October 1999, Dato' Hari Menon again wrote to Patrick Moran, inter alia, saying:

> I do appreciate in you taking the trouble to talk to the bankers for the withdrawal or waiver of the LC by the Malaysians.

[52] On 9 November 1999, Patrick Moran replied to this email. He, inter alia, reiterated:

> The bank will not change the requirements. In fact, as I earlier advised, the bank cannot change the requirement.

[53] All these emails show that CBC did not consent to the revocation or rescission of the SBLC. They were dated about five to six months after the notice of rescission. We hold therefore that the SBLC was not revoked or rescinded.

ESTOPPEL

[54] Actually, the issue of estoppel has, incidentally, been partly dealt with under the previous topic. Learned counsel for DYMM argued that estoppel was raised in two ways. First, SCBMB having issued the notice of rescission

on behalf of DYMM on 16 April 1999, SCBMB was estopped from recognising or accepting any call on the SBLC or from exercising any rights under the letter of set-off.

[55] We have seen from the facts the stand taken by SCBMB was very clear that the SBLC was irrevocable. However, considering the status of DYMM and the sensitivity of the issue, it obliged to assist to convey the notice of rescission to SCBNY.

[56] There must be a 'promise' on the part of SCBMB for DYMM to found estoppel. It is not the law of estoppel to hold that someone is estopped merely because he obliges another person at the latter's request while at the same time he made clear his legal position on the issue which was to the opposite effect.

[57] The second way in which estoppel was said to have arisen was put this way by learned counsel for DYMM:

> Secondly, having remained silent for 8 months without rejecting the notice of rescission, SCBNY as the agent bank of SCBMB, and SCBMB were estopped from recognising any call on the SBLC.

[58] First, we should be clear about the role of SCBMB and SCBNY. SCBMB obliged DYMM to send the notice to SCBNY to be passed to CBC for its consent. It was CBC who did not respond. So, if at all silence was to be taken as consent, it should be against CBC. But, CBC is not a party in these suits. SCBNY's role was only to convey the notice to CBC. This is recognised by learned counsel for DYMM in para 12 of his written submission. In our view, on the facts of this case the silence by CBC did not amount to consent. Neither could it be imputed to SCBNY which was merely asked to convey the notice, which SCBNY was not even obliged to do.

[59] Furthermore, we have also seen that the allegation of eight month's silence is not correct.

INJUNCTION

[60] We should recap here that on 15 December 1999 the notice of drawing on the SBLC was received by SCBMB and relayed to DYMM. On the following day, Dato' Hari Menon informed SCBMB that the loan had not been drawn down and asked SCBMB to convey the message to SCBNY. Taufik, by an email on the same date (16 December 1999) to Dato' Hari Menon said:

A ... we cannot send the notice until you serve SCBMB KL AND SCBNY the injunction. The onus is on your getting the injunction immediately before they present the draft or we will have to make payment.

B **[61]** DYMM obtained an injunction order on 18 December 1999. It is to be noted that four parties were named as defendants. They were TEC, Patrick Moran (CEO of TEC), CBC (the beneficiary) and SCBMB. However, this is what the order says:

C (1) that an injunction be and is hereby granted to restrain the third defendant from calling or drawing upon the standby letter of credit No 312010325732-A dated 12 February 1999 in the sum of USD1m (1,000,000) established by the fourth defendant in favour of the third defendant as beneficiary thereof to retire off or pay any outstanding indebtedness due from the first defendant.

D (2) that an injunction be and is hereby granted to restrain the fourth defendant from uplifting or exercising any rights under a letter of set-off (undated) executed by the plaintiff's principal over a fixed deposit of RM4,180,000 in the name of plaintiff's principal deposited in the Seremban branch of the fourth defendant.

E **[62]** Note that it is, first, to restrain CBC (the beneficiary) from calling or drawing upon the SBLC. Secondly, it is to restrain SCBMB from uplifting or exercising any rights under the letter of set-off executed by DYMM.

F **[63]** In these two suits, actually, we are not concerned with the first part of the order restraining CBC from calling or drawing upon the SBLC. CBC is not even a party in these suits. Furthermore, that part of the order was to restrain CBC and not SCBNY or its principal, SCBMB.

G **[64]** We now come to the second part of the order ie the order restraining SCBMB from uplifting the letter of set-off. That has been complied with by SCBMB. That is what these two suits are about. So, we see no merits in DYMM relying on the injunction order in these two suits.

H *The legal positions in a letter of credit transaction, fraud, duty of care*

I **[65]** Article 3 or the UCP 500 provides:

a. Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently,

the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the applicant resulting from his relationships with the Issuing Bank or the beneficiary.

[66] Article 4 provides:

In credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate.

[67] In *RD Harbottle (Mercantile) Ltd v National Westminster Bank & Ors* [1978] QB 146 at p 156, Kerr J said:

... banks are only concerned to ensure that the terms of their mandate and confirmations are complied with, eg of the conformity of the documents presented... This is unfortunate for the plaintiffs but it is what they have agreed. Banks are not concerned with the rights or wrongs of the underlying disputes but only with the performance of the obligations which they themselves have confirmed.

[68] In *Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor* [1978] 1 All ER 976, Lord Denning MR had this to say at p 981:

A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit. That was clearly stated in *Hamzah Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 Jenkins LJ, giving the judgment of this court, said, at p 129:

> … it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.

[69] To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank. The most illuminating case is of *Sztejn v J Henry Schroder Banking Corporation* [1941]

A 31 NYS 2d631 which was heard in the New York Court of Appeals. After citing many cases Shientag J said this:

> It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon
B presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.

[70] He said that in that particular case it was different because:

C > ... on the present motion, it must be assumed that the seller has intentionally failed to ship any goods ordered by the buyer. In such a situation, where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller.

D

[71] That case shows that there is this exception of the strict rule: the bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances when there is no right to payment.

E

[72] I would in this regard quote the words of Browne J in an unreported case when he was sitting at first instance. It is *Bank Russo-Iran v Gordon, Woodroffe & Co Ltd* (unreported), 3 October 1972. He said:

F > In my judgment, if the documents are presented by the beneficiary himself, and are forged or fraudulent, the bank is entitled to refuse payment if the banks find out before payment, and is entitled to recover the money as paid under a mistake of fact if it finds out after payment.

G

[73] But as Kerr J said in this present case:

> … in cases of obvious fraud to the knowledge of the banks, the courts may preclude banks from fulfilling their obligation to third parties.

H

[74] At p 983, the learned Master of the Rolls said:

> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must
I honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

[75] In *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168 at p 182, Lord Diplock said: A

> It is trite law that there are four autonomous though interconnected contractual relationships involved. (1) The underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank; (3) if payment is to be made through a confirming bank the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents.
>
> Again, it is trite law that in contract (4), with which alone the instant appeal is directly concerned, the parties to it, the seller and the confirming bank, 'deal in documents and not in goods,' as art 8 of the Uniform Customs puts it. If, on their fact, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction of deferment of payment.

B C D E F G H

[76] This case was referred to by Lim Beng Choon J in *Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 565. Lim Beng Choon J said, at p 567: I

> A review of the English case law seems to suggest that a performance guarantee, like an irrevocable or confirmed letter of credit, is a guarantee by the bank to a seller for payment of price. The bank is not concerned with the contract entered

into by its customer and the third party or with any dispute between the buyer and the seller. The terms of the guarantee and the bank's obligation to pay are contained in the guarantee itself.

[77] This case was quoted with approval by the Court of Appeal in *LEC Contractors (M) Sdn Bhd v Castle Inn Sdn Bhd* [2000] 3 MLJ 339.

[78] Pausing here, it is clear from the authorities that the general principle is that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are on the face of it in order and the terms of the credit are satisfied. However, there is one exception to this general principle: where an 'obvious fraud' or a 'clear fraud' has been brought to the notice of the bank. In this respect, a breach of the contract between the buyer and the seller, even if it has existed is an insufficient ground for the bank to refuse to pay. The relevant time that the fraud must be brought to the knowledge of the paying bank is prior to the actual payment to the beneficiary — see *United Trading v Allied Arab Bank* [1985] 2 LLR 554.

[79] That principle having been established, learned counsel for DYMM argued that it was fraud by a beneficiary when he made a claim on the letter of credit when he had no right to do so, or as Lord Denning puts it 'no honest belief he is entitled to payment.' (*United Trading v Allied Arab Bank* [1985] 2 LLR 554 at p 559). It is fraud where a false or forged document is used by the beneficiary to obtain payment. He referred to *Edward Owen Engineering* where Lord Denning said at p 364:

> The bank ought not to pay under the credit if it knows that the documents are forged *or that the request for payment is made fraudulently in circumstances where there is no right to payment*. (Emphasis added.)

[80] Learned counsel was relying on the under-lined clause. He then drew the court's attention to *Sztejn v Henry Schroder Banking Corporation* (1941) 31 NYS 23d 631 which was reproduced in *Jack on Documentary Credits* (2nd Ed 1993) at pp 209–210 where the bill of lading presented for payment was a false document because the seller had not shipped any goods at all. In that case, the US court observed:

> The distinction between a breach of warranty and active fraud on the part of the seller is supported by authority and reason. As one court has stated: 'Obviously,

when the issuer of a letter of credit knows that a document, although correct in form, is, in point of fact, false or illegal, he cannot be called upon to recognise such a document, as complying with the terms of a letter of credit.

[81] We have no problem with this argument on this point so far. We shall now see whether on the facts, this is such a case.

[82] Learned counsel argued that in the instant case, the loan was never released to TEC in November/December 1999 for US Dollars 1m and therefore the certification of indebtedness dated 22 December 1999 and 23 December 1999 were false documents intended to defraud the paying bank.

[83] However, this submission runs counter to the DYMM'S pleaded case in para 16 of the statement of claim in Suit No 6 of 2005 which reads:

16. The Plaintiff contends that notwithstanding this intimation (ie the intimation to suspend the SBLC — added) Connecticut Bank proceeded to release the funds to TEC and/or Patrick Moran *sometime on or about November 1999*.' (Emphasis added.)

[84] It is trite law that parties are bound by their pleadings. Thus learned counsel cannot now be heard to submit otherwise.

[85] In the circumstances we would allow SCBMB'S claim in Suit No 5 of 2005 as per prayer (i) with interest at the rate of 8%pa from the date of this judgment and costs. We would also grant SCBMB the liberty to set-off the judgment sum against the fixed deposit pursuant to the letter of set-off dated 9 February 1999. DYMM's claim in Suit No 6 of 2005 is dismissed with costs.

[86] We therefore order accordingly.

[87] Lastly, speaking for myself, I would like to place on record my appreciation for the contributions made by my learned brothers in the preparation of this judgment.

A *Plaintiff's claim in the first suit allowed with costs. Defendant's claim in the second suit dismissed with costs.*

Reported by K Nesan

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